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MATERIALS FOR TRIAL ADVOCACY

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TRIAL ADVOCACY
CASEBOOK
UNIVERSITY OF TORONTO
FACULTY OF LAW

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UNIVERSITY OF TORONTO
Faculty of Law
TRIAL ADVOCACY COURSE

COURSE DESCRIPTION

1. Materials

Required Readings (Available from Law Book Store)

(a) Casebook: Materials for Trial Advocacy: Problems and Case Files,

(b) Text: Mauet – Fundamentals of Trial Techniques.

(c) Course Description

Optional Readings (On reserve).

There is a book of readings on reserve in the library entitled Pilkington and Watson, ed, Selected Readings in Trial Advocacy (1981, revised 1988). A separate bibliography is included with these materials, which you may find useful during the course.

You will frequently make reference to the law of evidence and procedure and will want to have access to:

i) A text on evidence recommended: Sopinka Lederman and Bryant, The Law of Evidence in Canada (Toronto, Butterworths, 1992).

ii) Evidence Act, R.S.O. 1990, c.E.23.

iii) Canada Evidence Act, R.S.C. 1985, c. C-5.

iv) The Ontario Rules of Civil Procedure.

v) Criminal Code, R.S.C. 1985, c. C-46.

Ethical Questions frequently arise in the trial advocacy course. Please read carefully the materials in the casebook about ethics and in particular the Principles of Civility contained therein;

2. Use of Casebook and Sequence of Study

The Casebook contains Readings and Casefiles. Some of the Casefiles contain instructions for use in a Trial Advocacy programme format. Others do not. The Sequence of Study, which will be distributed separately, will contain directions as to the readings to be done, the case file to be worked on, and the assignment or specific task for the evening in question.

3. Learning Method

The purpose of the course is to assist you in developing the basic skills of trial advocacy so that you can conduct a trial from beginning to end with reasonable competence.

The method and materials are based on a program developed in the United States by the National Institute for Trial Advocacy (NITA). The method is explained in the Introduction to the Casebook. Basically, the techniques employed are (a) demonstration by experienced counsel, (b) student performance, and (c) critique.

How, within this framework, do you develop the requisite skills to a reasonable level? Obviously the major key is careful preparation for each assignment. But how do you prepare? The assigned readings will assist you-- and you should read them. After you have done that, and carefully read and analysed the assigned problem, what should you be considering in preparing for your performance?

There are several aspects of the teaching methodology to be used in this course which call for particular explanation.

Although you are expected to prepare the whole of the problem(s) that you are assigned each evening, when it comes to in-class performance, you will only be called upon to perform a segment - typically 5 minutes. Your instructor will direct you to the segment you are to perform. There is a specific rationale for this "5 minute format". Experience indicates that trial skills are developed best by students frequently performing short segments, rather than a single long performance. Obviously if each student was given the opportunity to do the complete assignment each evening, not every student could perform even one assignment on a given evening. Experience also indicates that 5 minutes gives you an opportunity to adequately demonstrate your present level of performance so that suggestions as to how to improve your performance can be offered. The reality is that if you perform for 10 minutes rather than for 5 minutes, you would essentially repeat the standard of performance that was demonstrated in the first 5 minutes.

In class, you will normally be called upon in pairs. When you have been called up, but are not examining, you will be expected to play the role of opposing counsel and to make any proper objections. Initially, you may be asked to make all possible

objections, and later, only the objections you would choose to make to serve your strategy at trial. In addition, the non-performing students will be responsible for making any objections overlooked by the opposing counsel. In preparation for making and responding to objections, we recommend that you review the applicable evidence law. However, this is not a course in evidence and the focus of your preparation and performance should be the assigned problems. Most instructors will not permit performance time to be taken up debating the evidentiary points.

Unless directed otherwise by your instructor, you are to assume that all problems arise in a trial that is being conducted before a judge and jury. Given that civil jury trials are now quite rare in Canada, questions are often raised as to why we use this assumption. The reason is that law students, for some strange reason, have it firmly fixed in their minds that judges like to have the facts presented in a complicated manner and they also like to be bored. Obviously this is untrue. On the other hand, students recognize the need to simplify the facts for a jury and to make the story-telling interesting. By assuming that all the assigned performances arise in the context of a jury trial, it is hoped that you will indeed strive to make your factual presentations simple, comprehensible and interesting.

4. Class Organization and Format

The class is divided into *Small Groups*. Each student has an "X" or "Y" designation. The "X" and "Y" designations are used on the *Sequence of Study* to indicate performance assignments. "X" or "Y" assignments are indicated separately in these materials.

The instructors in each section will rotate through the small groups although an attempt will be made to keep the same group of three instructors to the same two groups.. This format affords students the opportunity to be evaluated and receive comments and suggestions from different members of the teaching team while preserving some continuity of observation by instructors and therefore some enhanced assessment of improvement.

The format of the classes will vary from evening to evening and is indicated on the Sequence of Study.

- Most evenings, (from 6:00 pm to about 645 pm), all students will meet together in the Large Group for a demonstration or plenary session, to be held in a classroom to be announced. The purpose of this session is to provide a demonstration and explanation of the skills necessary to perform the tasks assigned for the workshops on the Thursday evening that follows.

- Each evening, you will divide up into small groups and go to assigned rooms (again, to be announced). During these sessions you will perform the assigned problems and your performances will be critiqued.

- On some Thursday evenings, you will meet as a section based on your trial assignment in differently configured groups, in order to prepare for and perform your specific trial assignment.

5. Teaching Team

The teaching team consists of trial lawyers experienced in a wide variety of civil and criminal matters, assisted by group leaders who are drawn from graduates of the previous years' trial advocacy courses. Their role is to assist in administering the course, to provide advice and guidance about assignments, to conduct demonstrations that are more realistic and accessible than those tours de force often provided by faculty, and to be a contact point for the group to which each is assigned.

Since advocacy is an art and not a science, you should not be surprised if you receive differing (and sometimes conflicting) comments from the instructors. You should also not be surprised if some instructors disagree with the approach suggested in the text. Some students can find this frustrating. However, the point of a mixed teaching team is to present you with a range of critical, and hopefully helpful suggestions, from which you will develop your own advocacy style.

Group Room assignments will be posted and delivered each week in advance of the class. We have learned that it is better to rotate people amongst rooms in order to give each student the opportunity or challenge of working in differing room configurations. During the course of the term, there will be times when room changes will occur because of events and special lectures. In such cases, there will be a posted reminder of the room change.

6. Class Witness Assignments

Except for the exercises dealing with experts, you will not meet with your witnesses. At this stage of your development, we feel there is more to be learned from conducting your examinations without preparing or rehearsing with your witnesses. The role of the witness in each problem to be performed in class will be played by a member of your group or a member of faculty. We will be trying as far as possible to have a member of faculty play the role of witness, so as to alleviate you of the burden of this task, and also, to prevent the inter colleague stress that can arise during cross examination role playing. However, each of you should be prepared to play the role of the witness. Students assigned to be witnesses must also be prepared to carry out the exercise assigned as an "X" or "Y". Please take witness assignments seriously - learn your part and play your role seriously. There is nothing more discouraging for a person

doing an examination or a cross examination than to be confronted with a witness who has to check the problem in order to figure out what liquor store was under surveillance, or who just doesn't know the critical facts at all.

7. Attendance

Attendance at each class session is compulsory. If you will be absent for any of the classes, you must contact Merrill Boden at 978-4908 to advise that you will be absent. If you are absent for discretionary (non illness related) reasons, a zero grade will be assigned to you for the class in which you are absent. As each performance is graded, and as final grades are based upon an average of the grades assigned in each class, absenteeism (except in the event of illness related absenteeism) will negatively affect the final grade. The schedules of the instructors do not allow for make up classes. We will accommodate any illness related absence to the extent possible. However, discretionary absences will result in a grade of zero being assigned to that particular evening.

8. Final Trials

(a) Trial teams and cases:

The culmination of the course will be all-day trials which will be conducted on the **weekend following the last formal class.**. These final trials will be held at the Courthouse, 361 University Avenue, in conjunction with York University Osgoode Hall Law School students taking a similar course. Instructors or experienced trial counsel will serve as judges. Pairs of Osgoode students will try a case against pairs from the University of Toronto. The case to be tried will be the case that will be used as the case file for the Arnup and Sopinka advocacy competition held in 2005. Four student counsel will act in each trial, with two person teams on each side. Each team will participate for only one day, either Saturday or Sunday depending on scheduling.

You may choose a trial partner from the students in the class. Otherwise, you will be assigned a partner. Traditionally, Osgoode has taken on the task of scheduling the trials and the trial teams. This is a difficult task, and one that has usually made most people happy. However, it is possible that it will be simply impossible to accomodate your trial preference. We would ask for your understanding if this occurs. You should complete the Case Preference Form that will be circulated and submit it pursuant to the instructions given on it by the deadline required.. No changes are permitted. . You will be informed in late October or early November of your actual trial date and assignment.

(b) Witnesses:

It will be the responsibility of each trial team to arrange for and prepare the witnesses they plan to call.

(c) Jurors:

You should prepare to invite friends, family, or others to attend at your final trial and play the role of a juror.

(d) Trial Book:

You are encouraged to prepare a trial book for use at the trial. A trial book normally contains the following:

(i) a tactical analysis of the case, setting forth your theory of the case, the problems you anticipate and how you expect to handle them;

(ii) a proof check list, setting forth (a) every fact you must prove as part of your case, indicating the source or sources, i.e. witnesses, exhibits, judicial notice, admission, etc.; (b) every fact the other side must prove;

(iii) outlines of your Opening Statement and Closing Argument;

(iv) a list of witnesses you expect to call, in the order you expect to call them;

(v) a complete outline of your preparation for the direct and cross-examination of all witnesses, each outline starting on a separate page, and your notes of items to cover in re-examination;

(vi) copies of all exhibits you plan to introduce;

(vii) copies of any previous statements made by witnesses, with key passages indexed and a note as to the manner in which the statements are used, if at all;

(viii) legal memoranda on the substantive issues;

(ix) legal memoranda on any anticipated evidence issues;

(x) written outline of proposed jury instructions.

For further direction, see articles in Selected Readings and those referred to on the reading list.

The preparation of your trial book is not a "make-work" project. Although you are not required to submit the trial book to be graded, you cannot conduct a trial properly without it.

9. Evaluation

Your final grade will be based upon your class participation (including being adequately prepared for witness assignments), any written submissions required during the course, and satisfactory completion of the final trial. The final trial will be graded based on the trial judge's assessment of your performance. The trial must be satisfactorily completed in order to obtain credit in the course. The course is graded Honours/Pass/Fail.

Weekly performances are scored out of 10 and based on preparation, theory and presentation. At the conclusion of the course, the performance grades are aggregated and divided by the total number of assignments performed for a final grade out of 10. The grade of each student in a group is then reviewed by the relevant Small Group instructor and Section Leader to ensure that it fairly represents the student's performance throughout the course. All grades are reviewed by the Course Chair to ensure consistency among sections. Spotty attendance or non-performance in the final trials without adequate explanation will affect your grade.

Student evaluation of the course is taken seriously and past evaluations have resulted in changes (hopefully improvements) to the course. Evaluations will be distributed and you will be handing them in during that class. Consistent with Faculty policy, no evaluations are read by instructors until grades have been submitted to the Records Office.

10. Reading about Trial Advocacy

A major focus of this course is learning by doing coupled with critique of your performance. This involves thorough preparation and the ability to listen to the comments made on your performance and that of other students in your class. The emphasis on performance in class leaves little or no time for lecturing. **However, this gap can and must be overcome by out of class reading.**

The writing on trial advocacy is voluminous, increasing, varied in quality and utility (i.e. some people find author A very useful, while others may not). To get the most out of the course you should do the reading. Each week there will be specific suggested reading assignments, however, these do not represent all the reading you should do in this course. The following represent the overall reading goals for the course.

Mauet should be read in its entirety by the end of the term.

At the outset of the course you may find it helpful to read Hegland, Trial and Practice Skills (on Reserve) Chapters 1, 2, & 4. The book is short, merely introductory but excellent when you are a beginner.

At the outset, or by the end of the course, you should read all of one (or both) of the following books: Sopinka, The Trial of an Action; Williston & Rolls, The Conduct of an Action. While not exclusively concerned with trial advocacy in the narrowest sense, they both deal with preparing for and conducting a civil trial. You may wish to purchase your own copies. Both are published by Butterworths.

You should read "Some Points on Trial Advocacy", found in the Casebook, which is not meant to be a substitute for more substantive readings, but which outlines some basic points with regard to trial advocacy.

In addition to the assigned text, there are five recently published Canadian texts on Trial Advocacy which are well worth your attention. They are on reserve in the library.

Earl Levy, Examination of Witnesses in Criminal Cases (Carswell, 1991).

F. Moskoff (Editor), Advocacy in Court - A Tribute to Arthur Maloney (Canada Law Book, 1986).

R. Salhany, Cross Examination: The Art of the Advocate (Butterworths, 1988).

J. Olah, The Art and Science of Advocacy, (Carswell, 1990).

G. Adair, On Trial, Advocacy Skills Law & Practice (Butterworths, 1992)

11. Arnup Cup Trial Advocacy Competition

This is an annual competition among Ontario law schools which is normally held at the University of Windsor Law School in February or March following the course conclusion.The University of Toronto sends a team of two students selected by the instructors from the students in the Trial Advocacy Course. The selection of the team will be made following the final trials,and this selection is made following consultation with all faculty. The University of Toronto has been the recipient of the Arnup Cup in 2000, 1999, 1997, and 1996 and a runner up in 2001.

12. The Sopinka Cup Competition

In 1999, the first annual national trial advocacy competition was held in Ottawa, with teams from each of the provinces competing. This competition is sponsored in part by the American College of Trial Lawyers, and by firms across Canada. As the winner of the Arnup Cup in 1999, the University of Toronto team formed part of the Ontario contingent at the Sopinka Cup competition. The University of Toronto team (Kate Hilton and David Armstrong) was the recipient of the first award of the Sopinka Cup for overall best case presentaion, and Kate Hilton was awarded the prize for best cross

examination in the trial competition. In the year 2000, Jenny Friedland and Noel Peacock won the Arnup Cup and as a result represented the University of Toronto at the Sopinka Cup competitions, where the prize for best examination in chief was awarded to the University of Toronto. In 2001, the University of Toronto again placed in the Sopinka Cup, winning the prize for best cross examination. The team in 2001 was Eileen Costello and Nick Adamson.

Over the past ten years of the Trial Advocacy course at the University of Toronto, we have been informed that the course has been a very positive experience for those who have taken it. We, the faculty, are proud to be part of a course that we hope will prove helpful in whatever area of law is pursued by those taking the course. We hope that you will enjoy the course as much as we enjoy teaching it.

INTRODUCTORY NOTE
EXAMINATION-IN-CHIEF, CROSS-EXAMINATION AND RE-EXAMINATION

The ability to examine and oppose the examination of witnesses in open court in an adversary setting is the most basic skill of the trial lawyer. Yet the most common criticism made of trial lawyers is their ability to conduct proper, intelligent, purposeful examinations and to oppose those examinations.

As with any skill, practice is the only sure way to achievement. The practice should be conducted with certain simple guidelines or rules in mind.

1. The purpose of any witness examination is to elicit information from a witness. But note that more is involved – it is to do so in a way that will persuade the judge or jury of the existence of a particular state of facts which is asserted by your client.

2. The basic format is an interrogative dialogue.

3. The witness is probably insecure. He/she appears in a strange environment and is expected to perform under strange rules. This is a handicap you must overcome on examination-in-chief and an advantage which you have (and may choose to exploit) on cross-examination.

4. Your questions should be short, simple and understandable to the witness and the judge and/or jury on both examination-in-chief and cross-examination.

    1. It is imperative that your audience - the judge and/or jury - understand your question so that they can reasonably anticipate and comprehend the answer.

    2. The insecurity (anxieties) of "your" witness on examination-in-chief will be increased if he/she does not understand your question.

    3. The complex, argumentative question provides a refuge for the witness on cross-examination.

5. As a general proposition, you may not lead on examination-in-chief (nor on re-examination) except (a) as to preliminary matters or (b) to refresh the recollection of the witness. Both of these exceptions are discretionary with the trial judge.

6. In any event, on examination-in-chief, leading questions and the perfunctory answers they elicit are not persuasive.

7. On cross-examination, you may lead and you should do so. Control of the witness on cross-examination is imperative.

8. At the outset of examination-in-chief have the witness introduce him/herself, then place him/her at the scene, then elicit the who, where, when, what, how and why of the relevant data he/she has to offer. Then quit. Do not be repetitious.

9. If you believe that cross-examination will elicit information which is unfavourable, consider the possible advantages to be derived by eliciting it during the course of your examination-in-chief.

10. Do not conduct a purposeless cross-examination which does nothing other than afford the witness an opportunity to repeat his testimony-in-chief.

    1. If there is nothing to be gained by cross-examination, waive it.

    2. If you can accomplish something by cross-examination, get to it.

    3. Be cautious about cross-examining on testimony elicited in-chief which was favourable to your position. You may lose it.

11. Be cautious about asking questions to which you can not reasonably anticipate the answer and be particularly cautious in those situations if the only evidence on the point will be the unknown answer.

12. Listen to (and do not assume) the answers of the witness.

13. Objections to the form of the question must be made before an answer is given. If the question reveals the potential inadmissibility of the answer, then an objection must precede the answer. The grounds of the objection should be succinctly and specifically stated. If a question does not reveal the potential inadmissibility of the answer but the answer is inadmissible, then an objection should be made as soon as the answer is given and again you should succinctly and specifically state your grounds.

14. If an objection is made to the form of the question and it is sustained, then the examiner should rephrase the question to cure the objection.

Robert B. White in "The Art of Discovery" (Canada Law Book 1990) usefully summarizes the possible objectives of cross-examination. He points out that some questions are more likely to provoke an emotional response than others and this should determine the order in which the possible objectives on cross-examination should be pursued:

In cross-examination at trial, there are four possible objectives:

1. To obtain additional, helpful evidence.
2. To qualify the evidence which has been given.
3. To impeach the evidence which has been given.
4. To impeach the witness.

The difference between getting additional evidence and qualifying the evidence which has been given is that the first need not require a challenge of any kind, while the second does involve an attack, if only a mild one. To solicit additional evidence one simply asks, "In addition to what you have told us, is it not also true that the defendant was wearing a trench coat?" In trying to qualify evidence one says, "You have said the defendant was going 150 kilometres per hour. You will doubtless concede that it could have been 145" - and so on.

Impeaching evidence is different from qualifying evidence. Qualifying evidence is an attempt to modify what a witness has said without challenging its inherent truthfulness. It takes the witness through the shades of grey. Impeaching evidence is to demonstrate through cross-examination that the evidence (not the witness) is wrong. It invites a retraction. Putting a previous statement to a witness and inviting him to accept it as a better recollection of events than the one he has given at trial is a common example of impeaching evidence.

Impeaching the witness goes further yet. The impeachment of a witness involves more than a suggestion that the evidence is unreliable. It is an assertion that the witness himself is unreliable and that he should not be believed. It is a full-scale, headlong attack against the personal integrity of the witness.

Each of objectives of cross-examination has a very different emotional component. Most people will not become upset at an attempt to elicit some additional evidence. Few people will not be upset at an attempt to impeach them as credible witnesses. The emotional components of these objectives suggest the sequence in which they should be attempted (if at all). Because a witness is not likely to be in a mood to volunteer additional help after his honesty has just been called into question, it is desirable to start with objectives which are less emotionally laden and then move up the scale of resentment as far as one needs, or dares, to go.

DEMONSTRATIVE EVIDENCE

INTRODUCTORY NOTE:

In addition to tangible things which are evidentiary in nature and which are offered and received in evidence, counsel may make use of demonstrative aids in their examination of witnesses. The use of these aids is largely discretionary with the court. If resorting to them will not be too time consuming and will not unduly emphasize the testimony of the witness, a judge may permit their use as an aid to understanding the testimony of a witness.

The problems in the use of demonstrative evidence generally occur because of the lawyer's lack of skill in dealing with the device once permission from the court to use it has been granted. One common shortcoming is the lawyer's failure to introduce the witness to the demonstrative aid or technique prior to the time he or she testifies. It is not sufficient that the witness is familiar with the subject matter illustrated in the aid. Unless the witness has seen the device and has become sufficiently familiar with the particular illustrations involved, the testimony can be disastrous.

The trial lawyer should also be careful to make the transcript intelligible to an appellate court. Statements by a witness such as "right here" and "at this point" will have no meaning to an appellate court. If the witness's testimony is to have any value on appeal, it must in some manner be translated into words or markings.